

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN RESTAURANT ASSOCIATION,
and TEAM LANDMARK, INC., MARQUETTE
MOUNTAIN FOOD & BEVERAGE
CORPORATION, PARK THIRD, INC.,
STARBURST CORPORATION, OFFICE
LOUNGE, INC., TIROLER HOF INN, INC., and
MICHIGAN CHAMBER OF COMMERCE,

Plaintiff-Appellees,

v

CITY OF MARQUETTE,

Defendant-Appellant.

FOR PUBLICATION
March 13, 2001
9:00 a.m.

No. 217232
Marquette Circuit Court
LC No. 98-035362-CZ

Updated Copy
April 27, 2001

Before: Gribbs, P.J., and M.J. Kelly and Hoekstra, JJ.

HOEKSTRA, J, (*concurring in part and dissenting in part*).

Because MCL 333.12915; MSA 14.15(12915) (hereinafter § 12915) requires preemption of defendant's smoking ordinance, I join with the majority in affirming the decision of the trial court. Section 12915 of the Public Health Code provides:

A county, city, village, or township shall not regulate those aspects of food service establishments or vending machines which are subject to regulation under this part except to the extent necessary to carry out the responsibility of a local health department pursuant to sections 12906 and 12908. This part shall not relieve the applicant for a license or a licensee from responsibility for securing a local permit or complying with applicable local codes, regulations, or ordinances not in conflict with this part.

In the first sentence, this statute plainly states that the provisions contained in this part preempt any attempts at further regulation by local governmental entities. MCL 333.12905; MSA

14.15(12905) (hereinafter § 12905), which is a provision of the part controlled by § 12915, regulates the same area as that addressed by defendant's smoking ordinance. Therefore, defendant's ordinance is preempted.

Defendant argues that this reading of § 12915 effectively renders the second sentence of this section meaningless. This argument is without merit because the second sentence addresses only local enactments "not in conflict with this part." Because this part of the Public Health Code does not occupy the entire field of regulations applicable to food service establishments, the second sentence has meaning in relation to those areas that are not addressed.

Respectfully, I disagree with the analysis of the majority with regard to whether § 12905 alone preempts defendant's smoking ordinance. Generally, a provision of the Public Health Code preempts enactments of local governmental entities only when the local acts are less stringent than those required by the state's health code. MCL 333.1115; MSA 14.15(1115). Because I read defendant's smoking ordinance to be more stringent than that of the state, I conclude that it is not preempted by § 12905. Plaintiffs' argument to the contrary begins with the premise that § 12905 guarantees that smoking space be made available, but allows individual food service establishments to reduce that space in their discretion. Plaintiffs misinterpret the plain intent of the statute. Section 12905 is intended to guarantee nonsmoking, not smoking, space. This is apparent from the language in subsection 1, designating all public areas to be nonsmoking except those designated otherwise, in subsection 2, where the emphasis is on the rights of nonsmokers, and in subsection 3, requiring a minimum area for nonsmoking regardless of how the rules are interpreted. The subsections are designed to ensure that nonsmoking areas exist within food

service establishments. Accordingly, because defendant's smoking ordinance provides for more, not less, nonsmoking space, it is not preempted by § 12905.

/s/ Joel P. Hoekstra